IN THE CIRCUIT COURT FOR THE COUNTY OF PRINCE EDWARD, VIRGINIA.

J. D. JENNINGS *v.* THE NORFOLK AND WESTERN RAILWAY COMPANY.

November 27th, 1914.

1. Pleading—Demurrer to Evidence.—On a demurrer to evidence, the demurree is entitled to the benefit of all his evidence and all fair inferences therefrom, while the demurrant waives all its evidence in conflict with that of the demuriee and is entitled only to such inferences in its favor as necessarily follow from the demurree's evidence or from its own evidence not in conflict therewith.

2. Negligence—Burden of Proof of Contributory Negligence.—In an action to recover damages for personal injuries, after the negligence of the defendant has been established, the burden of proving contributory negligence on the part of the plaintiff is on the defendant. This may be done by defendant's own evidence or by necessary inferences from the plaintiff's evidence.

3. Railroads—Duty of Travelers Approaching Crossings.—A traveler about to cross a railroad at a public crossing is required to use ordinary care to avoid being struck by a moving train, but the fact that he did get struck is not conclusive evidence of contributory negligence on his part. If the evidence discloses that he looked and listened for an approaching train before venturing on the track, the question as to whether or not this was ordinary care and whether or not he would have been struck had he used due care, was a question for the jury to determine.

4. Railroads—Gates at Crossings—Duty of Travelers.—The erection of gates at a public railroad crossing to warn travelers of approaching trains, while not excusing the traveler from the exercise of ordinary care and caution when about to cross the track at this point, does not necessitate on his part the same degree of care which would be required of him if such devices were not in use. The open gate invites the traveler to enter upon the crossing, and the railroad having extended this invitation and placed the traveler in immediate peril by its negligence, cannot require him to exercise extraordinary care and calmest judgment.

5. Railroads—Open Gates at Crossings—View of Main Track Partially Obstructed—Contributory Negligence.—Where the gate at a public railroad crossing it raised and the view of an approaching train is partly obstructed by cars on a side track, the question as to whether or not a traveler who looked and listened before crossing the side track, after crossing these tracks and before attempting to cross the main track, should have looked and listened for an approaching train, was a question of facts to be determined by the

jury, and on a demurrer to evidence the inference drawn by the Court must be against the demurrant.

6. Railroads—Crossings—Interference with Traveler by Gateman.—Whether or not a traveler crossing a railroad at a public crossing may have been so interfered with by an intoxicated gateman that he was prevented from safely crossing the track in time to avoid the accident, was a question of fact for the jury, and upon a demurrer to evidence the inference is against the demurrant.

Action of trespass on the case by J. D. Jennings against the Norfolk & Western Ry. Co. The defendant demurred to the evidence.

Demurrer overruled and judgment rendered.

The opinion states the case.

S. L. Ferguson of Appomattox, *F. C. Moon* of Lynchburg, and *J. Taylor Thompson* of Farmville, for the plaintiff.

Marshall McCormick of Roanoke and *F. S. Kirkpatrick* of Lynchburg for defendant.

GEORGE J. HUNDLEY, Judge: The plaintiff was injured by a train of the N. & W. Ry. Co on Oct. 24th, 1912, and brings this suit to recover damages for injury. The defendant demurred to the evidence in which the plaintiff joined. The negligence of the defendant is abundantly proven and was conceded by counsel for the defendant in the argument, so that it is only necessary to refer to the evidence bearing upon contributory negligence on the part of the plaintiff, which is contended for by the defendant, and briefly to the evidence tending to show the degree of negligence on the part of the plaintiff.

Let us first get clearly in our minds the law in regard to a demurrer to evidence when the defence is contributory negligence. The plaintiff is entitled to all his evidence and all reasonable inferences to be drawn therefrom, and the defendant waives all of its evidences in conflict with that of the plaintiff. The law is thus of the plaintiff. The law is thus clearly stated by Judge Keith in Marshall *v.* Valley Ry. Co., in 99 Va. page 806: "We cannot say that contributory negligence on the part of the deceased is a certain and incontrovertable inference from the evidence. Whether or not the inference is to be drawn from the facts proven is a question about which reasonable men may fairly differ."

The evidence shows that on the day mentioned there was a county fair in the town of Farmville and many more people than usual were on Main Street, crossing back and forth across the railway tracks between the fair grounds and the town, the grounds being a short distance north of the said tracks. There

were three tracks, two sidings on the north and the main track on the south. On the siding between the north siding and the main track, three or more freight cars stood, obstructing partially the view of the main track going east. The main track as well as the sidings curve sharply to the left, going east, and from a point three feet north of the first rail of the main track coming south, it was proven that a train approaching from the east might be seen 258 feet. The plaintiff had crossed over in the morning to the warehouse a distance of 100 or 150 feet from the track, and was returning to Farmville to get his dinner, about 1 o'clock, p. m., and was walking briskly across the main track when he was struck by the engine of the freight train, going west, when he was midway between the rails. He states that he saw the gates on the north side open as he approached, and as he left the warehouse gate he saw two men pass over in front of him, that he never noticed the gates on the south side and does not know whether they were ever lowered or not, but if they were lowered it was certainly not until just about the time he was struck and knocked unconscious. He states that he looked and listened as he went, and never saw or heard the train at all, that he was deaf in the left ear and blind in the left eye, but could see and hear out of the right eye and right ear, and his left side was turned towards the east as he passed over. He states that as he stepped on the track he saw people running about in an excited manner, but he did not know what it was about, but that it excited him, that as he got about midway of the track a negro rushed to him, caught him in the collar, without saying anything, and he thought he was trying to rob him and jerked back, and about that time the train struck him, as he was being jerked off by the negro. Anderson Ligon, a witness for plaintiff, stated that he was a special policeman, stationed at that point for the express purpose of watching for passing trains and protecting the public against danger, that he was stationed on the south side of the main track a few feet from the east gate, that he neither saw nor heard the train until it approached at the time of the accident, that he heard no whistle, nor was any bell rung. At that time his attention was attracted to Jennings and he hollered at him to get back. That gates on the south side were lowered about the time Jennings struck the north rail of main track—when he stepped on track. The gate man, a negro, did not lower the gates on south side until I told him to go there and lower them. He was fifty feet away when he ought to have been lowering the gates. He did something and then ran up the center of the track and grabbed Jennings. Those gates were falling as he ran. The front of the engine at that moment was about the center of the street, it struck him there. Engine might have

blown whistle down below the bridge, but with wagons and everything running around I never heard it. The train was running from twelve to fifteen miles an hour. Jennings was in the center of the track when the negro grabbed him, he jumped back like that (illustrating), and then the negro snatched him. The negro was drinking and was drunk at that time. Have known him for four years and have passed his place of business from four to twenty times a day for four years and it is mighty seldom that I have not seen him under the influence of whiskey. When Ligon was asked if Jennings was drunk, he said "I think he came across the track as straight as I could." Two very intelligent witnesses, Mrs. Kate Flippen and Mrs. B ssie Hobson, testified that they were coming fro the fair about the same time and stopped at the side tracks and listened and looked for a train, did not see any train but heard a rumbling noise; that Jennings passed them where they slood, walking quite briskly; that he showed no evidence of intoxication and walked as straight as anyone. Mrs. Flippen saw Jennings glance up and down the track as he approached it and he started across it; he didn't have time to look when he got to the main track, because when he got there the train was there too. "When I first saw the train it was right at the gate, right within where the gates came down." It was proven that main street was about sixty or seventy feet wide, and that everybody walked in the middle of the street, there being no sidewalks at that point. The jury were taken to view the site of the accident, and Jennings, being present, was requested to take a station three feet north of the first rail of the main track, coming south, and look down the track going east at a man stationed at a point 258 feet from where he stood, just where the curve in the main track would have hidden him from view, and asked to state whether the one freight car then standing on the side track to his left obstructed his view of the man there standing to the same extent that three cars would have done—the side track curving to the left just at the east end of the standing car. After several confused answers, witness admitted that the track did curve there for a distance greater than two or three cars.

The question for the court to decide now, bearing in mind the law as stated by all the authorities, is whether, upon this evidence, the jury could draw any reasonable inference in favor of the plaintiff as showing that he was not guilty of contributory negligence.

Contributory negligence must be proven by the defendant, but this may be done either by his own evidence, if any, or by necessary inference from the plaintiff's evidence. The proof is that the train was running at the rate of fifteen miles an hour and that the ordinances of the town of Farmville forbid the running

of trains through the town at a greater speed than six miles an hour, and also required the ringing of bell at street crossings. A calculation shows that a train running at the speed of fifteen miles an hour would cover the 258 feet from the point where it could be seen to the point where Jennings was struck in about 11 seconds. Now the question is—it being proven that Jennings was sober, that he was in vigorous health and was walking briskly and did look and listen, whether he ought to have seen or heard the approaching train before he stepped across the track, or whether reasonable men might infer from all the evidence that the train was not at that point when he looked and listened for it before he stepped upon the track, and further whether reasonable men might not differ as to whether the interference of a drunken negro, rushing upon him whilst in the middle of the track, might not have prevented him from crossing over safely and delayed him long enough in the struggle to prevent his getting over in time. Can we say that contributory negligence on the part of plaintiff in the language of Judge Keith: "Is a certain and incontrovertible inference from the evidence." This court thinks not.

There is a decision of our Supreme Court, Kimball and Fink *v.* Friend, 95 Va. p. 136, which is directly in point. The opinion is by Judge Buchanan, who rendered the opinion in case of Rangley *v.* Southern Ry. Co., 95 Va. p. 715; and also in the case of A. C. L. Ry. Co. *v.* Grubbs, 113 Va. p. 214. The evidence in this case was that a gong or bell was connected with the railroad track in some way, which sounded automatically when trains or engines approached; that the dec'd. approached the crossing on the morning of the accident through the narrow cut upon his bicycle, going about as fast as an ordinary horse trots; that as he reached the crossing he was struck by an engine of the defendants running about eight miles an hour and killed; that the railroad track in the direction in which the engine came could be seen from the center of the highway a distance of twenty-one feet, when within twenty-five feet of the west rail (the direction from which deceased was approaching), fifty-five feet when ten feet nearer, and seven hundred feet (six hundred and fifty of which was beyond the curve in the track), when within 9½ feet of the rail; that no notice was given of the approaching train either by sounding gong, ringing the bell, blowing the whistle or otherwise; that two other travellers, walking in the same direction toward the crossing and within fifteen or twenty feet of it when the deceased was struck, did not hear the approach of the engine until, in the language of one of them, "It jumped out and struck the man;' that the railroad track in the direction in which the engine came is visible at several points from the avenue over which the de-

ceased travelled, before he reached the narrow cut which leads to the crossing. The evidence shows that he did not stop as he approached the crossing, but no witness testified as to whether he did or did not look for an approaching train. The court says: "It is true that the deceased was bound to use reasonable care to avoid getting into a position in which he could not escape a collision, but the fact that he did get into such position is not conclusive evidence that he was there by his own negligence. He may have been there in consequence of the defendant's negligence and because he was misled by it. Whether he used due care to ascertain if a train was approaching depended upon inferences from facts to be found by the jury—the manner in which he approached the track—the speed at which he was travelling—the obstructions to the view of the track on which the engine was approaching—the negligence of the defendants as it affected the conduct of the deceased, whether the failure to ring the bell, sound the whistle, or in all combined, were among the facts to be found by the jury, and from which facts, in connection with all the other circumstances and facts of the case, the main fact of due care or negligence on the part of the decd. was to be found. Upon all these facts and circumstances, after a view of the ground, the jury were of opinion that it did not appear that the deceased was guilty of contributory negligence." This opinion of Judge Buchanan is in accordance with the doctrine that the defendant can not place an injured plaintiff in a position of extreme peril by its own negligence and then demand of him extraordinary care and prudence in avoiding the injury.

Judge Buchanan goes on to say that, "While courts and text-writers differ as to the degree of reliance that may be placed upon the invitation which an open gate or silent gong gives to the traveller to cross, they generally, if not universally, hold that the same degree of care and caution is not required of him as if there was no such invitation." So in this case, we may say that the question here is whether the plaintiff used due care in approaching the track, the speed at which he was travelling, the obstruction to the view of the track, the negligence of the defendant, as it affected the conduct of the plaintiff, whether that negligence consisted in the failure to ring a bell or sound a whistle or give any warning of its approach, or whether he was confused and excited and impeded whilst on the track by the interference of the drunken negro gate-keeper, and it must be remembered that the people who were running about on the south side of the track and the witness Ligon had a much better opportunity to see the approaching train than the plaintiff. The two cases referred to by the defendant Rangley *v.* So. Ry. Co., 95 Va., and N. & W. Ry. Co. *v.* Crow, 110 Va. p. 798, have no application to this case. In both of the cases the evidence of con-

tributory negligence was clear and conclusive. In the last mentioned case the evidence of the plaintiff was stated by the court to be unbelievable, contrary to common knowledge and common sense. This is certainly not true in the case at bar. And the court, therefore, overrules the demurrer to the evidence, and renders judgment for the plaintiff on the verdict of the jury. This opinion is to be filed with the papers in this case and made a part of the record, but not to be spread upon the order book.